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BEFORE THE ARIZONA CORPORATION COMMISSION

2009 APR 28 P 4: 08

Arizona Corporation Commission

COMMISSIONERSAZ CORP COMMISSION
DOCKET CONTROL

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APR 28 2009

KRISTIN K. MAYES, Chairman
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SANDRA D. KENNEDY
BOB STUMP

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In the matter of:

ROBERT FRANKLIN HOCKENSMITH JR.,
CRD# 1798614,

Respondent.

DOCKET NO. S-20631A-08-0503

**SECURITIES DIVISION'S MOTION
FOR PROTECTIVE ORDER**

Expedited Oral Argument Requested

On April 24, 2009, Respondent, through his counsel, filed two Notices of Deposition (hereinafter the "Notices") with Docket Control of the Arizona Corporation Commission (the "Commission"). The Notices are for the depositions of John Fink and Guy Phillips, both employees of the Securities Division who were listed on the Division's List of Witnesses and Exhibits. Each of the Notices command the witness to appear at the offices of Respondents' attorneys for testimony.

In filing and serving the Notices, Respondent failed to request and obtain leave to take the above referenced depositions. As a result, the Notices that were served are without any legal force or effect. Despite the foregoing, the Division now moves for the issuance of a protective order precluding Respondent from taking depositions of non-expert witnesses. The Division's motion is supported by the attached Memorandum of Points and Authorities.

Further, the Division hereby gives notice of its intent to file an Amended List of Witnesses and Exhibits, which will remove John Fink as a witness, and will add investor Dr. Shelly Friedman.

As the Notices contemplate the taking of testimony on May 5, 2009, the Division respectfully requests an expedited hearing on its motion for protective order.

MEMORANDUM OF POINTS AND AUTHORITIES**I.****THE ARIZONA ADMINISTRATIVE PROCEDURES ACT
PRECLUDES THE TAKING OF DEPOSITIONS EXCEPT
UNDER SPECIFIC CONDITIONS.**

Respondent cites Rule A.A.C. R14-3-109(P), Corporation Commission Rules of Practice and Procedure, as authority for the Notices, however, ignores the fact that the rule requires that depositions of witnesses “be taken in the manner prescribed by law” and the statutory provisions governing these proceedings. Application of the Commission’s Rules of Practice and Procedure is governed by the Arizona Administrative Procedures Act (the “Act”). A.R.S. § 41-1001 *et seq.* Under the Act, depositions may be permitted only by order of the presiding officer and only in two situations, neither of which are applicable in this case.

First, a presiding officer *may* permit the taking of a deposition, *for use as evidence*, “of a witness who cannot be subpoenaed or is unable to attend the hearing.” A.R.S. § 41-1062(A)(4). Clearly, by virtue of the use of the word *may*, authorization for the taking of depositions is a discretionary matter *for the administrative law judge*. Implicit in that discretion is an order of the presiding officer after appropriate application for issuance of a subpoena. Respondent has not sought an order from the presiding officer nor has he alleged the requisite circumstances under which a deposition may be permitted--that the witness cannot be subpoenaed or is unable to attend the hearing. The Division has already notified Respondent that it intends to produce the subject witness at the hearing. Accordingly, the first circumstance under which a deposition may be ordered does not exist.

Second, “[p]rehearing depositions... may be ordered by the officer presiding at the hearing, provided that the party seeking such discovery demonstrates that the party has a reasonable need of the deposition...” A.R.S. § 41-1062(A)(4), (emphasis added). In the present case, Respondent have not offered any evidence of need for depositions nor does any such need exist. With respect to the subject witness, Respondent is well acquainted with the subject matter on which the witness

1 will testify. As Respondent cannot demonstrate that the subject witness is unavailable for hearing
2 or that he has a reasonable need for such deposition, the two circumstances under which a
3 deposition may be permitted are not present. Accordingly, the depositions should not be allowed.

4 II.

5 **TESTIMONY OF THE DIVISION'S INVESTIGATORS SHOULD NOT BE** 6 **FREELY ACCESSIBLE.**

7 Securities Division investigators act under authority of the Securities Act. A.R.S. § 44-
8 1822 authorizes the Commission or its designated agents to make such investigations as the
9 Commission deems necessary to determine whether any person has violated the Arizona Securities
10 Act. Courts "give the Commission 'wide berth' when they review the validity of Commission
11 investigations. *Carrington v. Arizona Corp. Comm'n*, 199 Ariz. 303, 18 P.3d 97 (Ct. App. 2001).
12 Information obtained during the course of such investigation is confidential pursuant to statute.
13 A.R.S. § 44-2042 reflects the balance of the due process rights of persons regulated by the
14 Commission; the broad investigative powers of the Commission; the various privacy interests of
15 complainants, investors, witnesses, registered and licensed financial professionals, and investigated
16 persons; the general public's interest in public agency conduct; the general public's interest in a
17 fraud-free investment environment; the interests of other regulatory agencies in sharing
18 information and their own investigative integrity; and the Commission's mandate to enforce the
19 Arizona Securities Act. Pursuant to this confidentiality statute,

20 [t]he names of complainants and all information or documents obtained by any officer,
21 employee or agent of the commission, including the shorthand reporter or stenographer
22 transcribing the reporter's notes, in the course of any examination or investigation are
23 *confidential* unless the names, information or documents are made a matter of public
24 record. An officer, employee or agent of the commission shall not make the
25 confidential names, information or documents available to anyone other than a
26 member of the commission, another officer or employee of the commission, an agent
who is designated by the commission or director, the attorney general or law
enforcement or regulatory officials, except pursuant to any rule of the commission or
unless the commission or the director authorizes the disclosure of names, information
or documents as not contrary to the public interest.

A.R.S. § 44-2042(A) (emphasis added).

1 The confidentiality statute makes confidential:

- 2 • The names of complainants
- 3 • All information obtained in the course of any examination or investigation
- 4 • All documents obtained in the course of any examination or investigation

5 The Securities Division can only disclose such information or documents pursuant to the
6 provisions of the confidentiality statute. Respondent should not be allowed to freely intrude upon
7 the confidentiality of the investigative process under the Arizona Securities Act by deposing the
8 Division's investigator without the availability of supervision of the Administrative Law Judge,
9 who limits the scope of such testimony.

10 The confidentiality statute does not apply when the names, information, or documents are a
11 matter of public record. The confidentiality statute allows disclosure to specified regulatory or law
12 enforcement officials, disclosure pursuant to Commission rule, or disclosure if the Commission or
13 the Securities Division director authorize such disclosure as not contrary to the public interest.¹
14 Disclosure by investigative staff relating to ongoing investigation is not authorized by Commission
15 rule. Such disclosure would be contrary to the public interest, for the following reasons.

- 16 • The state's interest in the integrity of the administrative process.
- 17 • The public's interest in joint regulatory actions. Effective and efficient regulation of
18 people who offer or sell securities requires interagency cooperation—among state,
19 federal, and self-regulatory agencies. *Cf. Keegan*, 201 Ariz. at 349, 35 P.3d at 110
20 (public interest includes consideration of how disclosure would adversely affect
21 agency's mission). The private investigations of those agencies, the privacy interests of
22 those whose records may be included in the many records and information available to
23 those agencies, and the willingness of those agencies to share information are dependent
24 upon the ability to retain confidentiality.

25 ¹ "Public interest" in a regulatory statute is not a broad license to promote the general public welfare. The words take
26 meaning from the purposes of the regulatory legislation. *See National Ass'n for Advancement of Colored People v. Federal Power Comm'n*, 425 U.S. 662, 669, 96 S. Ct. 1806, 1811 (1976). The Commission has the discretion to authorize disclosure if it determines that the disclosure would not be contrary to the public interest in the Commission's enforcement of the Arizona Securities Act., the purposes of which are to protect the public in connection with the sale or purchase of securities, preserve fair and equitable business practices, suppress fraudulent or deceptive practices in the sale or purchase of securities, and prosecute persons engaging in fraudulent or deceptive practices in the sale or purchase of securities. *See Laws 1951, Ch. 18, § 20.*

- The ability of the Securities Division to fulfill its statutory mandate. The methods used, the information obtained, the resources available to the Securities Division depend upon the fact that confidences, privacy interests, and privileges are maintained.
- The personal or private information of third parties. In the course of an investigation or examination, the Securities Division may obtain information or documents regarding various third parties, such as friends, relatives, investors, employees, or victims. The otherwise private information of those parties should not be generally available to the public. *See e.g. Salt River Pima-Maricopa Indian Community v. Rogers*, 168 Ariz. 531, 815 P.2d 900 (1991) (the mere fact that a writing is in the possession of an agency does not make it a public record). *Cf. Stabasefski v. U.S.*, 919 F. Supp. 1570, 1575 (M.D. Ga. 1996) quoting *U.S. Dep't of Justice v. Reporters Comm'n*, 489 U.S. 749, 773, 109 S. Ct. 1468, 1482 (1989) ("The public interest does not include the disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct.").

Respondent should not be allowed to circumvent the confidentiality of the Arizona Corporation Commissions Securities Division's investigative process by taking deposition testimony from a staff investigator.

IV.

THE SANCTIONING OF UNNECESSARY DEPOSITIONS WILL RESULT IN UNDUE AND HARMFUL BURDENS ON DIVISION STAFF AND RESOURCES AS WELL AS UPON THE DEPONENTS.

The objective of an administrative proceeding is to provide fast, fair and inexpensive adjudication of matters within a particular agency's jurisdiction. The purpose of restrictive application of civil discovery devices is to ensure that that objective is achieved. Accordingly, the legislature severely limited the situations wherein the devices of civil discovery, including depositions, may be employed. Further, such restrictions are in complete conformity with the constitutional requirements of due process. In fact, it has long been recognized that there is no constitutionally protected right to any prehearing discovery in administrative proceedings. Silverman v. Commodity Futures Trading Comm'n, 549 F.2d 28 (7th Cir. 1977). If respondents in all contested cases were permitted to invoke the devices of civil discovery without demonstrating a genuine need, the Division's ability to perform its investigative and law enforcement function would be greatly impaired by tying up Division personnel and resources in unnecessary discovery

1 procedures. Moreover, the taking of depositions, except where a reasonable need may be
2 demonstrated, will lead to unnecessary and costly delays. Such delays are inconsistent with the
3 speed and cost-savings objectives of administrative proceedings.

4 V.

5 CONCLUSION

6 The purpose of administrative proceedings is to insure fair, fast and cost effective
7 resolutions to administratively justiciable matters. Accordingly, the legislature provided for
8 streamlined proceedings with limited procedural devices. Such streamlined proceedings comport
9 fully with the requirements of due process. Here, Respondent has been provided with complete
10 due process of law. He has notice of the allegations against him, copies of the exhibits to be
11 offered at hearing, and he will be provided other non-privileged documents obtained by the
12 Division in the course of its investigation in this matter. Respondent will have a full hearing on the
13 allegations. At that hearing, Respondent will be permitted to examine the Division's witnesses, to
14 call his own witnesses and offer his own evidence. Denial of the depositions proposed by
15 Respondent in no way deprives him of any constitutional right or protection. Rather, denial of the
16 proposed depositions advances the purposes of administrative proceedings and promotes the
17 efficient allocation of limited resources of both the Division and its witnesses.

18 Therefore, the Division moves for the issuance of a Protective Order precluding the
19 depositions requested by Respondent.

20 RESPECTFULLY SUBMITTED this 28th day of April, 2009.

21
22 By: Pamela T. Johnson
23 PAMELA T. JOHNSON
24 Attorney for the Securities Division of the
25 Arizona Corporation Commission
26

1 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing
2 filed this 28th day of April, 2009 with:

3 Docket Control
4 Arizona Corporation Commission
5 1200 W. Washington St.
6 Phoenix, AZ 85007

7 COPY of the foregoing hand-delivered this
8 28th day of April, 2009 to:

9 Mr. Marc E. Stern
10 Administrative Law Judge
11 Arizona Corporation Commission/Hearing Division
12 1200 W. Washington St.
13 Phoenix, AZ 85007

14 COPY of the foregoing mailed this
15 28th day of April, 2009 to:

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